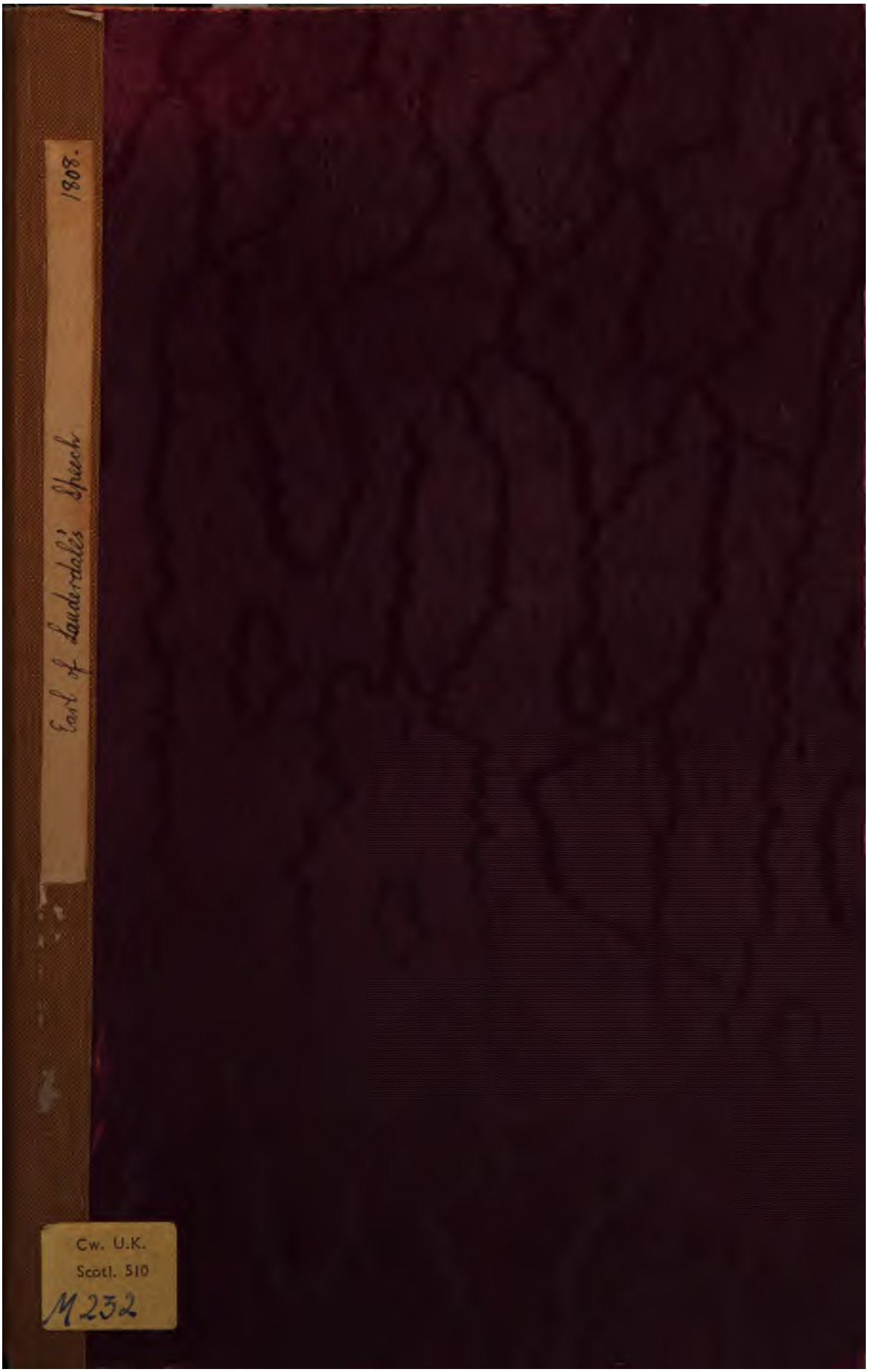
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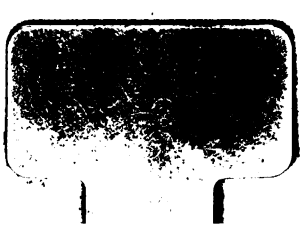

SPEECH

OF THE

EARL OF LAUDERDALE,

ON THE POWER

TO REAUGMENT THE STIPENDS

OF THE

Clergy of Scotland.

SPEECH

IN THE

HOUSE OF LORDS,

MAY 20TH, 1808,

ON THE

QUESTION

CONCERNING THE POWERS

OF THE

Court of Session

TO

REAUGMENT THE STIPENDS

OF THE

CLERGY OF SCOTLAND.

BY

THE EARL OF LAUDERDALE.

LONDON:

PRINTED FOR J. RIDGWAY,

NO. 170, OPPOSITE OLD BOND STREET, PICCADILLY.

1808.

SPEECH,

&c.

My Lords,

This is a case which comes before Your Lordships' House by appeal from the Court of Session: the Appellant is the Earl of Wemyss, who appears in the character of an heritor of the parish of Prestonkirk, though in reality he represents the landed interest of Scotland, for in the course of the argument this has been stated from the Bar to be their cause.

The Respondent is the Rev. Mr. Macqueen, the minister of that parish, who avowedly maintains what in the pleadings before you has been held forth as the cause of the Church of Scotland.

On the facts which have given rise to this case there is no dispute; both parties are agreed, that the stipend had been first modified and augmented in the year 1678, and that a second augmentation had been granted in the year 1793.

It is under these circumstances, that the clergyman of this parish, in the month of November 1806, raised a process for a further augmentation. Soon after the cause came into Court, it appears, that the Appellant in this case gave notice, that he was determined to dispute the competency of the Court under the Act of Parliament from which it derived its authority, to grant augmentations in cases which had been previously augmented and modified: and it seems to have been agreed on both sides to consider this purely as a question on the powers of the Court, without relation to any of the circumstances that might ultimately regulate the decision on the particular case. Accordingly, it was so argued on the 9th of December 1807, when the parties were ordered by the Court to give in memorials.

On advising these memorials, the Court pronounced an interlocutor to the following effect: "The Lords Commissioners having heard coun- "sel for the parties, and advised the memorials, "find that this Court having been established "by an Act in the year 1707, as a permanent "court of commission, in place of the former "temporary commissions for the purpose, *inter*

" *alia*, of modifying and augmenting the sti-
" pend of parochial ministers, out of the teinds,
" it is the duty of the Court, and within its
" powers, as recognised by the House of Lords,
" in two decided cases in the years 1784 and
" 1789, and by the uniform practice of the
" Court acquiesced in by all parties, in a great
" variety of instances, ever since the last-men-
" tioned period, to receive such applications,
" when made in the regular forms, and deter-
" mine upon them according to the state of
" matters at the time, and the merits of each
" particular case, notwithstanding a former aug-
" mentation since the institution of the Court;
" and therefore that the present case must be
" allowed to proceed as usual."

It is the justice and propriety of this interlocutor on which Your Lordships are now called to pronounce judgment: and those of Your Lordships who have attended the cause must be fully sensible that you have had on this occasion every advantage which could be derived from the learning and ingenuity of the Bar: the pleadings on both sides have been conducted in a manner that must have convinced you that the labour bestowed in preparing, and the talent

displayed in enforcing the arguments, left nothing more to be said on this important question.

In the pleadings of the counsel, the subject has been considered in two points of view:

First, what are the powers given by the Act 1707, to the Court of Session, acting as Commissioners for plantation of Kirks and valuation of Teinds.

Secondly, how far Your Lordships' House, by your decisions, and the Court below, by its practice, has not precluded you from now considering the jurisdiction the law gave, and established the proposition that the Court of Session, acting as Commissioners of Teinds, have a power vested in them to augment at their discretion the livings of the clergy, till the whole tithe is appropriated to the church.

The Court of Session was first authorized to judge on the subject of augmentation of ministers' stipend, and other matters relative to tithe, by the 9th Act of Queen Anne, 1707. It is the only Act of the Legislature from which that

Court derives any power whatever on this subject; and the question concerning its jurisdiction, if now open to discussion, must depend upon a fair construction of the provisions of this Act. The Act, however, does not in terms enact the powers which it confers, but refers for an accurate description and definition of them to the 19th Act of Parliament 1633, the 23d and 30th Acts of the Parliament 1690, and the 24th Act of the Parliament 1693.

The question concerning the powers of the Court as defined by these Acts, has been considered at the Bar in two different points of view.

First, it has been contended by the Appellant, that after a church was once modified and augmented, provided the stipend assigned, was not below the minimum as fixed by law, the Court could not re-augment, without encroaching on the sacred rights of property. On the other hand, by the Respondent, it has been argued, that the clergy, from the Reformation downwards, never gave up their claim to an adequate maintenance out of the tithe, and that the Court, without any invasion of the right of property, had a right to assign

such maintenance, and occasionally to augment it, as the circumstances of the times authorized.

Secondly, it has been stated on the part of the Appellant, that the Act 1707, and the Acts it referred to, in their enactments, only meant to confer the right of granting one augmentation of stipend, which was to endure in perpetuity, and that many concomitant circumstances clearly pointed out this to be the true construction of the law. On the other hand, this construction has been contested by the Respondent, and arguments have been brought from other Acts of Parliament to induce Your Lordships to conclude, that the Act 1633, on which this question mainly relies, never intended to circumscribe the powers of the commission it appointed to the granting of a single augmentation, but that it clearly conferred the right of reviewing its own decisions.

In the conduct of the argument, much learning has been displayed, on the appropriation of the tithe in ancient times in Scotland. The Act 1567, which granted a third of all benefices to the church, and the circumstances that the various grants of tithes to the lords of erection, were uniformly burdened

with the condition of maintaining the clergy, have been relied on as proofs that the clergy at no time, even after the Reformation, were deprived of that right to tithe for which the church has uniformly contended. On the other hand, it has been said, that this right was abandoned by the Protestant clergy: the authority of John Knox has been cited. The power of the titulars, and the circumstance that the parochial clergy had only the benefices of value under 300 merks conferred on them by the Legislature, have been urged as proving, that, after the Reformation, the divine right to tithe had been abandoned.

As bearing on the present case, all these considerations appear immaterial: whatever might be the rights of the parochial clergy, it is perfectly clear, that, antecedent to the year 1617, they had been reduced to extreme poverty. For in that year an Act of Parliament passed, which describes the state of the church in terms not equivocal; the preamble states:

"Considering that there be divers kirkes "within this kingdome not planted with minis- "ters, wherethrough ignorance and atheism

" abounds amongst the people; and that many " of those that are planted, have no sufficient " provision or maintenance appointed to them, " whereby the ministery are keept in poverty " and contempt."

Though this Act of Parliament is not referred to in the Act 1707, out of which this question arises, it has been dwelt upon in argument by both parties, as being the first Act appointing a commission, intrusted with the charge of providing for the parochial clergy out of the tithes of the church.

In the present case, for the better understanding of the Act 1633, it appears to me only necessary to state, that it provided that 500 merks of money, or five chalders of victual, should be the minimum; that 1000 merks of money, or 10 chalders of victual, should be the maximum, given as stipend to the clergy; and that after such a provision was made, the holder of the tithes should be quieted in his possession for ever.

It is proper also to remind Your Lordships, that another commission was appointed in the year 1621, similar in principle and effect to that established in the year 1617.

It is material also, here to observe, what indeed was admitted at the Bar, that the stipends given to the clergy, under the provisions of these Acts, were to be paid either out of the tithes held by the Bishops, or the tithes held by titulars; for the parsonage tithes were already the property of the church; and the lands held *cum decimis inclusis*, never were subjected to any provision for the maintenance of the clergy.

That such were the circumstances when the general arrangement of Charles I. concerning the benefices of the clergy and the situation of the tithe was carried into execution by the Acts of Parliament which passed in 1633, is admitted by both parties at your Bar. And as this case appears to me very much to depend upon the true and sound interpretation of one of these Acts, viz. Chapter 19, it is necessary shortly to allude to the public feeling on the subject of tithe at the time in which it was passed.

King Charles I. soon after coming to the Throne, evidently appears to have wished that some general arrangement should be made on this subject. It seems to have been his inten-

tion, if possible, to settle the disputes existing about tithes, in a manner advantageous to all parties: submissions were entered into in the most formal manner, and the result of the award, carried into execution by the Acts passed in 1633, was an arrangement apparently beneficial to all who were concerned.

The Crown got a right of purchasing the superiority from the titular, at the rate of ten years purchase, and an annuity of six per cent. out of the tithe.

The titular was quieted in the possession of his property, which had been disputed by the Crown.

The landholder got rid of the grievance of drawing the tithe in kind, his tithe was to be valued, and he was only to be assessed in perpetuity in a fifth part of the then value of the lands; he obtained, also, a right, if he chose it, to purchase his tithe so valued, at the rate of nine years purchase.

The clergy were on their part benefited by the minimum being advanced from 500 to 800

merks, and the commission appointed were no longer restrained in relation to the maximum of what was to be given as a proper stipend for the minister.

In considering the Act of Parliament which passed in the year 1633, the words of the Act, as well as the history of the times, have been relied upon as proving, that it meant to enact, and did actually enact, a final settlement of all claims concerning the tithes; and there can be little doubt, that words stronger or more appropriate to produce this impression could hardly have been selected.

The preamble recites what had been the King's object from the commencement of his reign, and describes the enactments to be, "for "the finishing and full perfection of the glorious "work anent the teinds and maintenance of mi-"nisters"—an accurate description of the law, if it was meant to settle once for all the state in which the parties were permanently to stand; but a very false representation of it, if it meant only to provide for the sale to the landholder of that, which it was to be understood the parochial

clergy had a right to claim, the moment the purchase was effected.

This Act ordains the tithes to be valued, and gives to the Commissioners power, after the valuation, to appoint a *constant* local stipend for ministers: the term *constant* has been dwelt upon by the Respondent in this cause: much reliance has been placed on the circumstance, that *perpetual* is dropt, which was used in the former Acts, and that the word *constant* is here resorted to: between these a distinction has been made; *perpetual* is said to be properly used in relation to time; *constant*, as applicable to regular payment: but it is impossible to conceive that there is any real distinction betwixt the meaning of these words, as used by the Legislature: and if the Act itself is examined, it is clear that the word *constant* was not used for the purpose of securing the regular payment of the stipend, as that is afterwards especially provided for in a subsequent clause of the Act, when the Commissioners are directed to "set down "the security in favour of the ministers, so far "as concerns the maintenance assigned to them, "for good, thankful, and timeous payment of "the rate of teind."

The price for which the tithe was to be sold by the titular to the landholder, subsequent to the clergyman's provision, has been relied on by both parties: by the Respondent it has been said, that nine years purchase was a very inferior price: he has argued, that it is so stated by Mr. Erskine, who says, " that the tithes were sold at that " inferior price from the circumstance of their " being subject to future augmentations."

By the Appellant it has been contended that the price was adequate, that the interest of money was at that period at ten per cent. which was evidently the case as appears from the Act 1633 providing that the lender of money should receive only eight per cent. and that the remaining two should go to the Crown: the authority of Mr. Laing has also been relied on: his history has been quoted in opposition to Mr. Erskine, and the parties have canvassed whether a lawyer or an historian was best authority for the market rate of interest in remote times. It is to be observed, however, that the interest of money is stated to have been at ten per cent. at this period, by the clergy themselves, in the answer drawn up by the Committee of the General Assembly, to the third and fourth reasons of dissent in the year 1750.

Independent of these, however, there are various circumstances, which make me incline to the opinion that nine years purchase was deemed an adequate and full price for the tithe.

The superiorities sold to the Crown under the same Acts of Parliament were valued at ten years purchase, which, like the tithe, conveyed an unimprovable annuity, with the sole distinction, that the feudal service, certainly worth one year's purchase, went along with it.—This alone is strong evidence, that nine years purchase was, at that period of time, deemed a fair price for a quit-rent; and on the authority of the King's declaration, it appears that this was the light in which it was considered.

But it is not only upon the words and provisions of the Act 1633, and upon the contemporaneous exposition of it, derived from such authority, that I am disposed to ground the opinion, that that Act meant to give to the landholder a right to his tithe, unburdened with any obligation for increased allowance to the clergyman.

Circumstances at no very remote period from the passing of the Act, as well as subse-

quent enactments of the Legislature, appear to me to prove, that this was understood to be the real meaning of the Act, beyond a possibility of doubt.

As the commission constituted under the Act 1633, was to endure during His Majesty's pleasure, in the year 1636-7, a selection of persons from the nobility and clergy were appointed by His Majesty to report whether this commission should be allowed to continue, or whether it was then fit to put an end to it.

This Report having been framed by the ecclesiastics, was agreed to, with some exceptions, by the lay lords: in the narrative it recites, "that "the clergy had from the first objected, that "the tithes being the proper patrimony of the "church, and reserved particularly in the Act "of annexation, should be heretably disponed "and sold to the heritor." Now it is impossible to conceive that the clergy should have this feeling if the tithes subsequent to sale, had been, as the Respondent contends, equally liable to future augmentations as before the sale.

The Act 1633 must have made on their minds a very different impression: they knew that

both by the Act 1617, and the Act 1621, in express terms the tithe was discharged from all further claims, after payment of the sum modified; they knew that the Act 1633 had raised the minimum from 500 to 800 merks, that it had left the maximum indefinite; and if they had thought, as the Respondent contends, that the law was altered to such an extent, as to reserve to the church a right to come back for re-augmentation as often as they thought fit, how is it possible that they should have felt themselves aggrieved or concerned, whether the tithe went to the landholder, or remained with the titular? They might as well have opposed the sale of a titular's right, as the sale from the titular to the landholder, if this had been deemed to be the sound interpretation of the law at that time.

But this is not all: in no part of this Report is it stated as a ground for keeping up this commission, that the circumstances of the times might authorize the clergy to come back; on the contrary, it is said, that many of them not having got the statutable allowance, and others, though their stipends were modified, not having obtained decrees of locality, it is judged most necessary, that the Commission should

"be kept up till *the work was ended*;" clearly implying, that the clergy and nobility, in making this Report in the year 1637, still conceived that the object was the same as recited in the preamble of the Act 1633.

Strong evidence of this being the sound construction of the Act 1633, is also to be found in the Act of Parliament which passed Nov. 15, 1641: this Act, though not referred to by the Act 1707, and in truth not in existence, being rescinded after the Restoration, may be referred to as explaining the sense Parliament entertained at the time of the Act 1633; and any illustration derived from it is the more forcible, because the power the Presbyterian clergy then possessed, ensured that the interpretation the most conformable to their interests of which it was susceptible would be imposed upon it.

Yet this Act does not empower the Commission it appoints, to take into consideration, generally, what sum it was fit to grant to the clergyman out of the tithes which had been sold. Indeed it specially bars the possibility of augmentations being granted on this principle, because it confines the attention of the Com-

missioners to those cases, "who got not the "benefit of the former Commission, and have "not the full quantity of eight chalders of victual, "or 800 merks, according to the tenour of the "Acts of Parliament made in anno 1633."

The only other cases submitted to the cognizance of this Commission, where previous augmentations had taken place, were those where there existed proofs of agreement betwixt the minister and his heritors, or where the parish minister had been defrauded by the interference of the prelates.

The Act 1641 further shews, that the landholder was deemed to have acquired a real right to that which he had purchased, by cautiously avoiding under any circumstances subjecting his property to further demands.

But it is not the phraseology of the Act 1633; it is not the full knowledge of the King's intention and of the tenour of his decreets arbitral; it is not His Majesty's declaration of his sense of what had been done; it is not the clear coincidence in opinion of the clergy themselves in their Report in the year 1636; nor even the commentary afforded by the rescinded Act 1641,

upon which I rely in giving a decided opinion on the meaning of the Act 1633. The Reports of the decisions of the Commission appointed under this rescinded Act, support this interpretation of the Act of Parliament in the strongest manner. In the Acts and practicks of the Commission 1642, there are three decisions reported upon very different points, but none of which can in common sense, be reconciled to any other view of the law, than that which I have given to Your Lordships.

The Acts 1633 and 1641, it will be recollected, ordered the Commissioners to set aside, after the valuation of the tithe, a constant local stipend for the clergyman, and then gave to the landholder the right of purchasing the remainder at nine years purchase. It appears that there came before the Commission a case, wherein it was disputed, whether the landholder could purchase his tithe before the minister got a stipend; and it was decided, Earl of Haddington against Bearford, that the heritor may buy his teinds, although the kirk be not provided, if he be content to undergo the proportional part of the augmentation, when it shall be granted, notwithstanding the right he had acquired by pur-

chase, clearly shewing, that in this case the landholder was to be subjected to an obligation after purchase, to pay the augmentation; an obligation, which it is never alleged, existed in any conveyance from the titular to the landholder of tithe, subsequent to an augmentation having been granted.

There is another decision of the same day, in the case of Erskine against Ker, and the minister of Lecropt; it is there found, that the titular is not obliged to augment the minister's stipend if it was augmented by the last Commission, by agreement betwixt the titular and the minister, provided it proceeded by way of reference from the Lords Commissioners, to any of their number to sanction the agreement with the parties: now it is clear that nothing can bear more strictly on the point than this decision. In truth, it shews that the Commission under the Act 1641 could not in their opinion re-augment a living, even supposing it was proved that collusion had taken place between the parties, provided the Commissioners acting under the former commission had sanctioned the result of that collusive agreement: how much more strongly, therefore, must they have felt themselves obliged to reject a claim, where a decision had been pronounced

by the Commission after due and full examination of the case?

There is also a Report of a decision of Feb. 22, 1643, which goes to confirm the same interpretation: in the case of Forgandenny it is found, "that the kirks provided by the "former Commission, if they be bishop's kirks, "and provided within 800 merks, or eight "chalders of victual, that by the Act of Par-"liament they have power to provide them "further"—clearly shewing that the sense of the Court was, that no addition could be made to the stipend of a kirk, if it were not a bishop's kirk, and if it had not less than 800 merks, or otherwise fell under some one or other of the exceptions of the Act 1641.

That the Legislature meant, by the Act 1633, to give to the landholder a clear right, at the rate of nine years purchase, to the full possession of the tithe conveyed after a provision given for the clergyman, to be enjoyed by him in the same manner as if his property had been held *cum decimis inclusis*, does not even rest upon all this body of evidence, which I have taken the liberty to detail: a strong cor-

roboration is derived from the Act of the year 1690, Chap. XXIII. This Act conveys to the patron of the parish all the parsonage tithes not heretably disponed, which it subjects generally, not only to past but future augmentation of stipend: it obliges the patron, as the Act 1633 had obliged the titular, to sell the parsonage tithes thus acquired to the landholder:—but they were to be conveyed under the obligation on which they were held; i. e. subject to future augmentations. Had they been conveyed, released from all such burden, the fair price must have much exceeded nine years purchase, as fixed in 1633. The interest of money had been reduced by an Act of the Legislature to six per cent. in 1661. It was reduced in Queen Anne's time to five. The value of a quit-rent in the year 1690, therefore, must have greatly exceeded nine years purchase, but in consideration that those tithes were to be subjected to future augmentations, the Act fixes their value at six years purchase, which on principle, as the market rate of interest of money was then at five, and in 1633, at ten, must have induced the Legislature in 1633, if the tithe had been to have been conveyed to the landholder subject to the same burden, to have fixed the value at three years purchase instead of nine.

In opposition to all this body of evidence, tending to explain the real meaning of the Act 1633, on consulting my notes, I can only find two circumstances which have been urged by the Respondents that appear to me to bear upon the question.

First, it has been said, that the Act 1633 could not have been understood as an ultimate settlement of the stipend of the clergy, because, by the Act 1641 a power is given to grant a further augmentation; and the ground upon which this proposition was submitted to Your Lordships, is, that in the year 1633 there were general powers given to the Commissioners to go below the minimum, and that in this Act they are only empowered to go below the minimum in special cases, which was a provision more favourable for the clergy. To this circumstance, however, I can give no weight; nothing has been brought to shew, that this is not in itself a specification of those very cases, and of the whole of them, with regard to which the exception had been made in general terms in the year 1633: on the contrary, from the respect paid to the Act 1633, by the whole tenour of the Act 1641, the presumption arises that it was only a specific enumeration of the cases understood to be generally alluded to in the Act 1633.

Secondly, it is said, that the rescinded Act 1649 is also more favourable to the clergy than the Act 1633; and this observation is grounded on the circumstance, that in the Act 1633, where victual cannot be given to the clergyman, the conversion is settled at the rate of 100 merks for a chalder of victual, whereas by the Act 1649, it was settled at a sum between 100 merks and 100 punds: if, however, this Act is consulted, it will be seen that it noway relates to churches which had antecedently received an augmentation under any former Commission; and that it alludes alone to churches which had not been augmented: indeed, the words of that Act recite, and specially regard the provisions of the Act 1633, as a conclusive settlement.

To these objections, therefore, I can attach no importance.

I have now stated the grounds on which I have formed a decided opinion, that the Act 1633 gave to the landholder a clear right to his tithes, after a due provision to the clergyman being once modified, unburdened with any future obligation to provide increased stipends; and I have in vain looked for any enactment in

the Acts of the 23d and 30th of the year 1690, and the 24th of the year 1693, the other Acts referred to in the Act 1707, which interfere with or invalidate the right so conferred.

With regard to the second question, how far the Act 1633, or the other Acts of Parliament referred to in the Act 1707, bars the clergy from obtaining more than one augmentation, provided that augmentation had not been obtained by collusion, or is not below the minimum; it is to be observed that if the proposition I have endeavoured to establish, viz. that the Act 1633, in so far as relates to tithes belonging to the titular, and to tithes belonging to the bishop, gave a complete right to what remained, after the stipend was once modified, is well-founded, it flows as a corollary that no subsequent augmentation could be granted.

In relation to the parsonage tithe, sold under the Act 1690, I own that is the subject on which, from the discussion at the Bar, I think Your Lordships have received the least satisfactory information: in this case, however, you are relieved from all consi-

deration of the tithe thus circumstanced, as it is agreed by both parties that the tithe out of which this augmentation is claimed is tithe conveyed from the titular, in consequence of a purchase by the landholder, from whom the Appellant derives his title.

There is still one observation of some importance that arises out of the Act 1707, from the use there made of the phrase, "to grant "augmentations,"—a term seemingly copied from the Act 1690, and which is not to be found in the Act 1633. It is the more necessary to take this into consideration, as it appears that the chief argument on which the Justice Clerk, and some of the other Judges, rest their opinion, is derived from the use of this phrase. To understand the import of it in the various Acts of Parliament in which it is used, it is necessary to attend to the circumstances of the times in which this phrase was first introduced. It is first to be found in the rescinded Act 1641, and I apprehend that the meaning which Your Lordships must annex to it, is apparent when you recollect the legislative arrangements for the maintenance of the clergy at the time this Act passed.

The Commission 1617 and 1621 had proceeded to modify stipends under enactments that made 500 merks the minimum that was to be allotted to clergymen for their sustenance. The Commission 1633 had acted under an Act of Parliament which directed that 800 merks should be the lowest: if therefore the words of the Act 1641 had authorized the Commission only to appoint constant local stipends, without the addition of the words, "and grant augmentations," it would have precluded that Commission from taking under consideration the case of those ministers who had obtained 500 merks under the Commission 1617 and 1621; and who had now a right to require that their stipends should be increased to 800 merks, the stipulated minimum, under the formal agreement sanctioned by the Act 1633.

The Act 1641, Your Lordships will recollect, was done away at the Restoration; and the Act 1661, which was passed at that time, contains the same powers to grant augmentations, obviously for the purpose of including the case of clergymen, whose stipends had been modified under the Acts 1617 and 1621.

Such are the grounds on which I cannot help forming a decided opinion, that the Act 1707 gave to the Court of Session powers to provide an adequate stipend, and to augment the livings of those who were provided with stipends under 800 merks, by the Commissions 1617 and 1621, or to grant augmentations in parishes, where by collusion the stipends had been fixed at a sum under the minimum; but no power whatever to review the decisions of former Commissions, or their own decisions, where a stipend above the minimum had been provided.

On the subject of the practice of the Court subsequent to the Union, there has been produced no direct evidence, to shew that the Court for a length of time did not proceed on the idea, that this was the nature of the power they enjoyed. On the contrary, there is strong reason to believe that this was the view of the law under which they acted.

President Craigie's evidence certainly tends to establish this opinion: he was examined before the House of Commons in the year 1751, and there is in his evidence the following remarkable passage:

"And being further examined, was asked, "whether, since the Union, the heritors in "augmentation suits have not been frequently "under difficulties in proving their defences; "that the teinds have been before valued, or "the stipends before modified, by reasons that "the records of the Commissioners of Teinds, "antecedent to the reign of Charles II. were "lost by shipwreck, and those from that time "to 1702, were consumed by fire." He answered, "That they had,"—clearly implying, that in his opinion a proof that stipends had been before modified under any Commissions, was a defence from an augmentation claimed from the Court of Session, acting under the Act 1707.

To the same purport is the evidence of Mr. Chalmer, father of an eminent solicitor who practises at Your Lordships' Bar, who seems to have possessed all the accuracy and assiduity that distinguishes his son: he says, "That he "had examined the records of all the decreets "of the Court of Session, since the Union "to the year 1738, relating to the augment-"ation of ministers' stipends; and that he "does not know any instance, or find any one

" upon record, wherein the Court of Session " have augmented any living within that pe- " riod *which had before obtained a decreet of* " *modification.*"

These expressions, it is apparent, are perfectly general, applying to a decreet of modification under any former commission, and not confining themselves to an augmentation granted by the Court of Session since the Union.

The same doctrine is asserted in the petition of the landholders to the House of Commons, which is signed by President Dundas, and some other eminent lawyers.

Indeed, I may on this subject rely on the authority of the clergy themselves, for in the answer to the third and fourth reasons of dissent of the landholders, drawn up by the Committee of the General Assembly, 1749, there is to be found the following passage, which strongly marks a coincidence of opinion on their part:

" One thing, however, we cannot omit to " observe, that though by several Acts of Par-

" liament, the clergy have right to an aug-
" mentation, the Lords have held it as a rule,
" to augment no stipend modified and localled
" since the Union although many cases occur
" in which such augmentation ought to have
" been granted."

It is to be observed, that the meaning of this passage must depend entirely on the punctuation. It may mean that the Lords have since the Union held it as a rule to augment no stipend, antecedently modified and localled; or that the Lords have held it a rule to augment no stipend, where the decreet of modification has passed since the Union; but the history of the times, as admitted by the Respondents in this case, clearly shews that it must have the former meaning. It is here stated, that many cases occur in which such augmentations ought to have been granted, which is perfectly consistent with the former interpretation of the sentence, but quite inconsistent with the latter; as the Respondents admit that there was no case in which two augmentations of the same living had been granted since the Union, previous to the year 1749, except the case of Kettle in the year 1742, and

the word *many* never could have been applied to the single case of Kettle; which case turns out, on examination, to have been erroneously referred to, as it was a decreet of locality, and not a second augmentation that was given in the year 1742. Thus the clergy themselves must be understood in the year 1749, to have sanctioned the interpretation of the law here contended for.

It certainly, however, appears to me, that even at this period there was some loose idea of a rule existing, that the Court of Teinds might grant one augmentation in every parish, and that they then considered themselves as *functi officio* with regard to that parish. But at what time this rule was first acted upon, how or by what authority it was introduced, has been explained by neither party at the Bar.

On the nature of the rule, the parties seem to me to be by no means agreed. The one side contends, that it was a rule of Court, that only one augmentation should be given; the other contends, that it was a rule of Court, that they would only grant one augment-

ation. If, however, I am right in stating that the Court by the Act 1707 had no power to augment in any case, where there had been a previous decreet of modification, this last must have been the nature of the rule; and indeed it is so explained by Lord Braxfield, and Lord Eskgrove, in the notes of their speeches 1787, who on that occasion describe this rule as a stretch made by the Court. It was, probably, gradually introduced, and originated in the extreme difficulty of discovering whether a parish had been modified under the parliamentary Commissions antecedent to the Union, in consequence of the loss of part of the records by shipwreck, in the time of Charles II. and the destruction of the remainder by fire in 1702.

In whatever manner it originated, it is evident, that the Court in practice ultimately assumed to themselves the power of granting in every case one augmentation; and it is equally clear that there is no instance on record, in which two were ever granted till the case of Kirkden, which came before this House in the year 1784.

It is true, the Respondents have relied on a list of no less than fifty-three cases, wherein they have asserted that second augmentations were granted previous to this Kirkden case: on examination, however, it appears that these are all either cases which proceeded on consent, or cases where decreets of localities were granted, subsequent to decreets of modification; and far from affording evidence to support the proposition for which they were brought forward, one of them, viz. the case of Marytown, affords evidence that establishes the contrary position; the interlocutor pronounced in this case, 25th Feb. 1753, is to the following effect:

"Having considered the prepared state and "foregoing debate, *in respect of the decreet "of modification and locality, anno* 1718, find "the process of augmentation not competent, "and assoilzied the defenders therefrom, and "decern."

Such was the law, and such appears to have been the practice of the Court, when in the year 1778 the minister of Kirkden brought his action for an augmentation before the Court of Session.

In this process, appearance was made for the heritors, who contended, that as the petitioner's predecessor in office had obtained a decreet of augmentation in the year 1716, the Court had no right whatever to grant any further augmentation. On advising the cause, the Court found the pursuer barred by the decree of augmentation 1716. A reclaiming petition was given in, and the Court altered its interlocutor, declaring that "the decree of "modification in 1716, after giving a proper "allowance for furnishing communion ele- "ments, the stipend thereby modified is within "the minimum, and therefore find the pur- "suer not barred from insisting for an aug- "mentation."

The heritors in their turn reclaimed, and the Lords declared that they again altered their interlocutor of the 3d of March, and recalled the directions given to the heritors on the 16th of June last, to swear to their rentals in the usual form, and adhere to their interlocutor of the 16th of July 1778.

Against this decision a petition of appeal was presented to this House, the terms of which it

is highly necessary for Your Lordships to attend to:—the powers of the Court of Session acting as a Commission of Teinds, are noways brought under your consideration: it is stated, that "in this process, appearance was made for "the heritors, who contended that as the peti- "tioner's predecessor in office had obtained a "decreet of augmentation in the year 1716, "the petitioner was thereby barred from in- "sisting in this present process *in terms of a* "*resolution of the Court, by which it is declared* "*that where any augmentation has been ob-* "*tained by decreet of the Court, posterior to* "*the year* 1707, *that no new augmentation of* "*the same stipend shall be granted.* Parties "having been heard upon this point, the fol- "lowing interlocutor was passed, That the "pursuer was barred from insisting in this "process, by the decreet of augmentation "1716; and therefore assoilzied the defenders, "and discharge the action."

Such is the statement made by the petition of appeal in that case, from the cases both of the Appellant and Respondent, which by the law of Scotland must be deemed to form part of the records of the Court. It distinctly appears,

that this was the question argued before Lord Thurlow. The Appellant specially states in the reasons for reversing judgment, that the Respondent cannot bar the Appellant from insisting in the present action, under the authority of *a pretended rule of Court*, by which they say it is declared that no addition can be made to a stipend, which has already been augmented by a decree posterior to the year 1707; and the Respondent joins issue with him in this point, by declaring in the reasons annexed to his appeal case, that "it is the "established rule of Court, not to review or "allow such decrees to be overhauled upon "any pretence, where an augmentation has "been given since the Union."

Thus whilst the petition of appeal plainly shews that the judgment of the Court of Session was arraigned, because it had proceeded on the ground of the existence of a supposed resolution of that Court; the cases both of the Appellant and Respondent bear evidence that it was argued in this House on that ground, and the whole tenour of the notes of Lord Thurlow's speech, in giving the judgment now published in the memorial for the minister, proves

that it was argued and decided upon this principle. "If," says that Noble Lord, "that "is the law of the land, it must be good: "but, if only a principle of discretion, the "discretion erected into a rule is inept; unless "the law has furnished that rule." This sentence alone, which shews on the one hand the law of the land had not been rested upon in argument, because in that event he never could have expressed the doubt which he states; and on the other, that he felt that just indignation which he must have felt, at the Court of Session assuming to themselves the power of making any rule on the subject, is evidence, that the judgment reversing the interlocutor of the Court of Session in this case, decided the only question that was then before the House, viz. the efficacy that ought to be given to the pretended rule of Court. It is against this rule that Lord Thurlow specially expresses his indignation: he says, "In none of the "books is there the smallest trace of this rule; "and when the Lord Advocate says, the Court "are in the daily practice of it, he must mean "that it is an idea always afloat in the minds "of the Judges." And he concludes, by declaring that "the Court have no reason in

" expediency, or authority in law, to say they " will not look into it."—Into what? why, most certainly, into the law of the land, which in the prior part of his speech he had declared could alone regulate the proceeding.

It is in vain, therefore, to say that this was a decision on the general point of law: there is the strongest evidence that the point of law never was argued before this House, and that my Lord Thurlow, if he is supposed to decide the point of law, must have done what nobody will accuse him of doing; i. e. he must have rashly decided a point of law not before him, and noways argued or discussed by the Counsel.

It is further to be observed, that Lord Thurlow, by reversing the interlocutors complained of, gave efficacy to the interlocutor of the 3d of March, which declared that the stipend modified 1716, was within the minimum, so that in truth the judgment simply reversing the interlocutor complained of, was a judgment of this House, proceeding on the specialties of the case.

The other case, in which the Court of Session in their interlocutor have found that

Your Lordships decided the general question of law, is the case of Tingwall, which was first brought into Court in the year 1785, when the heritors appear to have pleaded in bar a previous augmentation granted in the year 1722. But before I call your attention to the decision in this case, I must make an observation on the nature of the proceedings which took place, as they prove beyond a possibility of a doubt, what at that time was the general opinion of the judgment given by the House of Lords in the case of Kirkden.

If this House, by reversing the interlocutor of the Court of Session in the case of Kirkden, had been understood to declare the law, as is argued by the Respondent, and to have decided the competency of that Court, acting under the Act 1707, to re-augment stipends as long as the tithe of the parish remained unexhausted, could there have been an argument in the Court of Session on the subject, far less an unanimous decision on the incompetency of the Court, when they must have all known the recent judgment moved by Lord Thurlow in this House? On the other hand, if they were in the knowledge that the decision of this House was grounded on that Noble Lord's hav-

ing arraigned as inept any resolution of their Court, which barred a due consideration of what was the law of the land on the point—was it not natural to expect, that, driven from the ground behind which they had for years entrenched themselves, they would be forced to discuss the law, which, relying on the rule, had not of late been the subject of their consideration, accordingly as might be expected? Those of Your Lordships who have attended to the proceedings in this case, must recollect that after a hearing in presence, and memorials being given in, there took place a very learned discussion on the abstract question of law, which ended in an unanimous judgment of the Court, against the power that was contended for.

The notes of the Judges' speeches are printed in the Memorial for the Appellant; and though Lord Thurlow had on the authority of the Lord Advocate, now Lord President, stated that the Court was in daily practice of referring to the rule which was urged as a bar in the Kirkden case, not one syllable is said on that subject throughout the speeches then made; clearly proving that the decision in the Kirkden case must have shut their mouths on a

subject, to which on similar occasions there is evidence they had daily habits of resorting.

In this case of Tingwall there were special circumstances in favour of the clergyman, on which it is at present needless to dwell. Your Lordships have in the notes of the Judges' speeches on this cause, evidence, that when it came into the Court below, the parties agreed that the general point of law should be there argued, and that no specialties should be founded upon; so says Lord Robertson, who was counsel for the clergyman, and Lord Newton who acted as counsel for the heritors; and this is confirmed by Lord Armadale, in the very able speech he delivered on that occasion.

The interlocutor of the Court was given in the most general terms, dismissing the process; and upon advising on a reclaiming petition from the minister, the Court adhered:—against this interlocutor, an appeal was presented to this House:—the printed cases on this occasion shew that the parties, as in the Court below, confined their argument to the general question of law; but the specialties of

the case appeared on the record, and the judgment proposed by Lord Thurlow, and adopted by the House, is conclusive evidence that this House came to no judgment on the general point of law; it is clear that the Noble Lord, in the interlocutor he proposed in the Kirkden case, told the Court of Session, they should decide not upon their own rules, but upon the law of the land; and it is equally clear that he meant to inform them by this interlocutor, that justice required they should, in the decision of every case, take the actual circumstances into their consideration. The judgment is in the following terms:

"Having considered the terms of the decree "of modification and augmentation, which, "as the libel alleges, was obtained by the "minister of the said united parishes in 1722, "and that the minister was, in consequence "thereof, allowed to possess the *ipsa corpora* "of the teind till lately, when the heritors "proceeded to obtain a decree of locality; it "is ordered and adjudged, that the several "interlocutors complained of be reversed, and "that the cause be remitted back to the Court "of Session in Scotland, as Commissioners

" for the plantation of kirks and valuation of " teind, in order that parties may be further " heard upon the effect of the above circum- " stances, and upon the state of those teinds " in these united parishes, without prejudice to " any plea or argument which either of them " may adduce; and that the said Lords Com- " missioners may then give their determination " accordingly." This judgment speaks for itself: it is impossible by any torture of interpretation—to use the phrase ascribed to Lord Thurlow—to conceive that it was a decision of the general point of law. If Your Lordships had the evidence of the whole fifteen Judges, that it was so considered, the tenour of the judgment is such, that they could only impress upon your mind astonishment at the misconception that had taken place.—But is this the case?—It is true the Justice Clerk informs you, that this is his recollection of what passed; that the Lord President states to you, " That " if any gentleman thinks that the case of " Tingwall was decided on specialties, and not " upon the general question, regarding the " powers and duty of the Court, under the " construction of the Act 1707, he deceives " himself; for it is most certain, the cause

"was argued and decided upon the general "question alone."—These learned Judges were both of them counsel in the cause. It is admitted, that the general question of law was alone argued from the Bar; and it is natural, that, impressed with a recollection of their argument, they should at a distant period of time fancy that the judgment was founded on it, and not on the specialties contained in the record; but what account did this very Lord President give of the decision at a recent period after it took place?—Lord Newton tells you, that so far was the judgment of the House of Lords from being considered as a decision on the general merits, that he was "informed by a Right "Honourable Counsel, who pleaded the cause in "the House of Lords, on the part of the heritors "(meaning the Lord President), that it would "require no fewer than three appeals, in cases "which stood in different circumstances from "one another, to obtain a decision on the ge-"neral point at issue"—clearly shewing that the impression on his mind at that time, was accurate with regard to the decision of the House of Lords; i. e. that the decision was what the words in which it was conveyed prove it must have been, a judgment dictated by a consideration of the specialties of the case.

From these details, it must appear evident to Your Lordships, that the only decision ever given on the general point of law, concerning the competency of the Court to reaugment, was the unanimous decision pronounced in the Tingwall case, by the Court of Session itself. It is impossible, therefore, that Your Lordships can affirm an interlocutor, which states you to have decided in two cases a point of law, on which certainly you never pronounced any decision.

If, therefore, I cannot agree to the justice of that view of the law, which lays down that the Court, under the Act 1707, had power to reaugment out of tithes sold by the titular to the landholder, till they were completely exhausted: on the other hand, it is impossible to accede to the fact stated in this interlocutor —that this House had recognised such an interpretation of the statute, by a judgment which it never gave.

In the course of the pleadings, Your Lordships have had various quotations from Forbes on Tithes; from Sir G. Mackenzie's Observations on the Statutes, from Lord Bankton,

and from the Institutes of Mr. Erskine. With respect to most of the passages which have been relied upon, when examined, they are mere affirmations of a proposition never contested, that the tithe of the landholder in all parishes not modified, is subject to such provision for the clergy, as the Court acting as a Commission shall appoint.

In Mr. Erskine's works undoubtedly there is a passage, which can alone be considered as maintaining the opinion, which the interlocutor under review has expressed; but, whatever weight may be due to the authority of any law-writer, when the statutes themselves are clear, and the meaning of their enactments unquestionable, it is impossible that any authority can be relied on, to do away that which the Legislature has so distinctly declared, and which the Court had confirmed by their judgments immediately after passing the Act.

Your Lordships have been told, that in this case you have the advantage of the opinions of the Judges corrected by themselves; I have had already occasion to mention the opinion delivered by Lord Armadale, in the manner

which I think it merits; but I must conceive it to be an exercise of charity, not to animadvert on many of the opinions that have been printed. They are in truth defences urged by the Judges for their own conduct, which they might have made, without reading the learned arguments in this cause, which have done credit and honour to those who framed them.

In some of the opinions, the learned Judges have assumed the character of witnesses, and I am sorry to say that in that capacity their recollection of the facts appears to me as remarkable for inaccuracy, as their legal arguments are for want of research and investigation, on a subject which did demand their utmost attention.

There is now only one important point to consider: certain it is, that founding on this misconception and misrepresentation of the decisions of Your Lordships' House, the Court of Session have now for a length of time, and in no fewer than 800 cases, augmented stipends, many of which augmentations, had it not been for this misconception of the law, would not have been granted. But it is impossible that any series

of decisions, where the law was never controverted;—where from the silence of the heritors you have a right to suppose that they waived the defence which the law authorized; can have the effect of altering what is the clear and undoubted law of the land.

In the course of the pleadings in this cause, various cases of second augmentations, proceeding with the consent of the heritors, have been stated to Your Lordships. Auchendoire, Edenkellie, at a very early period, afford instances of this nature; and in the case of Lochcarron in 1768, a reaugmentation is especially given in respect of the heritors' consent; but in the pleadings in the case of Kirkden or Tingwall, in the opinions of the Judges delivered in this last case, no allusion is made to precedents such as these, which, from the circumstance of consent, must have been deemed inapplicable:—if a decision is given in one instance, the Court may proceed, without inquiry, to act on the same principle in five hundred cases: it is only when the point is argued and fully canvassed, when the attention of the Judges is called to it by the parties, that they have an opportunity of reviewing and reconsider-

ing their judgment; and on this subject I have the authority of the Court of Session itself; for though betwixt the decision of the Kirkden and Tingwall cases there were no less than twenty cases decided, without the heritors arguing the legal defence, yet in the pleadings this circumstance is unnoticed, and it did not prevent the Judges from coming to a unanimous decision, that the Court had no right to re-augment, which is the only decision on the general point of law that ever was given, either in that Court, or in Your Lordships' House.

If I had any doubts, whether those decisions in which the general question of law never has been argued, ought to weigh with Your Lordships in the case you are now called upon to decide; I should be relieved both by the numerous authorities of writers on this subject in the law of England, and from the decided opinions given on this point, no longer ago than last night, in Your Lordships' House; when it was clearly laid down, that though the judgment of a Court is the most respectable authority for what was the received sense of the law at the time it was given; no series of

decisions ever can do away the will of the Legislature clearly expressed.

In submitting to Your Lordships the propriety of reversing this interlocutor, I feel great satisfaction in thinking that, if I prevail, Your Lordships' decision will convey a mere declaration of your sense of the law, without in any degree affecting the interest of any of the parties. Your Lordships have heard a great deal from the Respondent, of the confusion that would be created from this circumstance: I do apprehend, however, that this can have no weight with you, in regulating your judgment. Even if the mischief was to be as extensive as it is represented, it might be a serious subject for Your Lordships' consideration in your legislative capacity; but, acting in your judicial capacity, it is a view of the question which ought to be excluded from your minds. In truth, however, it is a small portion of the eight hundred cases of augmentation granted under this erroneous view of the law, that could be affected by this decision: those augmented within these five years, are the only cases which, in consequence of your judgment, would be liable to be questioned.

No one can be more sensible than I am, that in these cases the interposition of the Legislature is necessary:—that an Act of the Legislature must be passed, regulating the granting of augmentations to the clergy of Scotland, is a proposition generally acceded to, and nothing can be more easy than the introduction of a clause, quieting those in the possessing of their augmentations, who have obtained them within the last five years.

I think it fortunate too, that the interest of the clergyman, the Respondent at Your Lordships' Bar, cannot be materially injured. It is more than fifteen years since he obtained his last augmentation; and though it may not be regular to allude to any intended Act of the Legislature, still it is perfectly known to the public, that the legislative measure, which may probably be adopted, will not preclude this Reverend Gentleman from immediately coming before the Court, to obtain that augmentation for which he is a suitor at your Bar.

It now only remains for me to apologize to your Lordships for having so long occupied your attention; and to read the judgment which na-

turally flows from the principles I have endeavoured to establish:

"In respect it appears to this House, that, by the Act 1707, c. 9, no powers are given to the Court of Session, as a Commission of Teinds, for augmenting or modifying stipends out of teinds held by the titular under an heritable right, or purchased from the titular by the heritors in terms of the Decreet Arbitral of Charles I. confirmed by Parliament, 'others than those given to the Commissioners appointed by Act 1633, c. 19; and that the said Commissioners, under the Act last mentioned, had no powers, out of teinds of the above description, to augment any stipend which had once been modified by them or by any former Commission, and did not fall short of eight hundred merks; and in respect it further appears, on examination of the records of this House, that no judgment was pronounced by this House, declaring the powers of the Court of Session to reaugment stipends, and review the decrees of augmentation pronounced by themselves or by former Commissioners, as is found by the interlocutor complained of; therefore, it being

admitted that the stipend of the Respondent was modified and augmented in 1793, and that the tithes of the Appellant are tithes acquired by purchase from the titular; it is ordered and adjudged that the interlocutor complained of be reversed."

THE END.

S. Gosnell, Printer, Little Queen Street.